

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:11cv94**

DAVID HICKS,

Plaintiff,

v.

**TRANSIT MANAGEMENT OF
ASHEVILLE, INC., a wholly owned
subsidiary of FIRST TRANSIT, INC.,**

Defendant.

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ORDER

Pending before the Court are Defendant's Motion to Dismiss [# 5] and Motion to Strike [# 14], and Plaintiff's Motion for Leave to File Amended Complaint [# 17] and Amended Motion for Leave to File Amended Complaint [# 19]. The Court **GRANTS** Plaintiff's motions [# 17 & # 19].

I. Background

Plaintiff brought this action in the Buncombe County District Court to recover \$9,704.32 he contends he is owed in unpaid sick leave after Defendant terminated his employment. Subsequently, Defendant removed the case to this Court on the basis of federal question jurisdiction because it contends that this case is governed by a collective bargaining agreement and the claim is preempted by the Labor Management Relations Act. After removing the case, Defendant moved to

dismiss the Complaint in its entirety.

In response to the Motion to Dismiss, Plaintiff submitted two exhibits to the Court, including his affidavit. This affidavit set out additional facts not contained in the Complaint. Defendant then moved to strike these affidavits. Rather than respond to the Motion to Strike, Plaintiff moved for leave to file an Amended Complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure. Plaintiff seeks leave to amend his Complaint in order to add the exhibits as attachments. Defendant opposes granting Plaintiff leave to amend. The parties' motions are now properly before the Court.

II. Analysis

Federal Rule of Civil Procedure 15(a) provides that a party may amend its pleading after the expiration of the time periods specified in Rule 15(a)(1) "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) further provides that leave to amend shall be freely given "when justice so requires." Id. Absent a showing of undue delay, bad faith, futility, or prejudice to the opposing party, a court should grant a party leave to amend. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227 (1962); Equal Rights Center v. Niles Bolton Assocs., 602 F.3d 597, 603 (4th Cir. 2010); Laber v. Harvey, 438 F.3d 404, 426-27 (4th Cir. 2006).

Plaintiff seeks leave to amend in order to attach the exhibits submitted in

response to Defendant's Motion to Dismiss to his Amended Complaint. Plaintiff has not previously sought leave to amend. Upon a review of the pleadings in this case, the Court finds that granting Plaintiff leave to amend is warranted. Although Defendant may or may not ultimately prevail on having Plaintiff's claim dismissed, the Court cannot say that the proposed amendments are so futile as to warrant denying Plaintiff one opportunity to amend. Because allowing Plaintiff leave to amend will not result in undue delay or prejudice to Defendant, and the proposed amendments are not futile or made in bad faith, leave to amend is appropriate in this case. See Equal Rights Center, 602 F.3d at 603; Laber, 438 F.3d at 426-27. Accordingly, the Court **GRANTS** Plaintiff's Motion for Leave to File Amended Complaint [# 17] and Amended Motion for Leave to File Amended Complaint [# 19].

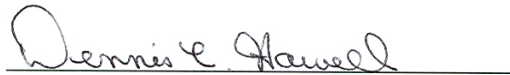
The Court, however, **INSTRUCTS** Plaintiff that he should file an Amended Complaint that incorporates the factual allegations contained in his affidavit into the body of the Amended Complaint so that Defendant can adequately respond to the allegations. The Amended Complaint, rather than affidavits attached to it, is the proper place for alleging all factual allegations necessary to state a claim against Defendant. Moreover, if Defendant moves to dismiss the Amended Complaint and Plaintiff attaches additional affidavits setting forth factual allegations not contained in the Amended Complaint, the Court will strike the

affidavits and rule on the motion based on the well pled factual allegations contained in the Amended Complaint.

III. Conclusion

The Court **GRANTS** Plaintiff's Motion for Leave to File Amended Complaint [# 17] and Amended Motion for Leave to File Amended Complaint [# 19]. Plaintiff shall have fourteen (14) days from the entry of this Order to file his Amended Complaint. The Court **DENIES as moot** the Motion to Dismiss [# 5] and Motion to Strike [# 14]. Defendant shall have twenty (20) days from the filing of the Amended Complaint to file its answer or otherwise respond.

Signed: November 7, 2011

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Dennis L. Howell
United States Magistrate Judge

